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No. 79-1245

In the Supreme Court of the United States

OCTOBER TERM, 1979

ANTHONY ACAVINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 47-48) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1979. On January 8, 1980, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including February 11, 1980. The petition was filed on February 12, 1980, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether hearsay evidence was improperly admitted.

2. Whether the charge of a single bribery conspiracy was defective because of the conspirators' dual motives for offering the bribe.

3. Whether the evidence of petitioner's intent was sufficient to support his conspiracy conviction.

4. Whether evidence of illegal activities not charged in the indictment was improperly admitted.

5. Whether the prosecutor improperly expressed an opinion on the evidence.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to bribe a federal official, in violation of 18 U.S.C. 371 and 201. He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. 47-48).

The evidence at trial[1] showed that on July 17, 1978, Drug Enforcement Administration agents, acting pursuant to a warrant, seized laboratory equipment and approximately two pounds of methamphetamine from a residence in Philadelphia, Pennsylvania (2 Tr. 129-131). Ten days later petitioner telephoned Leonard Meadows, whom petitioner knew to be a DEA informant (2 Tr. 78). Petitioner stated that some of his friends had been present during the drug raid and asked whether anything could be

[1]The government's evidence consisted in part of several tape recordings of conversations involving petitioner or his co-conspirators.

done to help them. Meadows responded that he would find out who was handling the matter. The following day petitioner again called Meadows and was informed that the DEA agent had agreed to a meeting (1 Tr. 26B-28).

On July 31, 1978, DEA agent William Kean met with petitioner. Petitioner said that he was not personally involved in the drug activity and that other individuals would soon be arriving to speak with the agent. Shortly thereafter, co-defendants Thomas Aufierio and Vincent Gangemi arrived at the meeting (2 Tr. 135-136). Kean then spoke privately with Aufierio and Gangemi, who said that they had "heard [he was] asking twenty thousand to fix the case" and that the DEA had "our laboratory equipment" (2 Tr. 136). Kean replied that he did not want any money and that "they had better get their act together" (*ibid.*).

On August 2, 1978, petitioner and Meadows discussed offering money to Kean to secure the release of James Bailey, who was then in jail as a result of the July 17 drug seizure (1 Tr. 31, 49). Petitioner suggested that co-defendant Robert Mucci meet with Kean to discuss the matter (1 Tr. 33). On September 12, 1978, petitioner met with Meadows and told him that Kean would be paid $50,000 to "admit an error, or * * * find some legal loophole" that would enable Bailey to be released (1 Tr. 54-55; see also 2 Tr. 11-12). On September 19, 1978, Meadows told petitioner that Kean was ready for a meeting. Petitioner responded that he wished to contact Mucci. The following day petitioner called Meadows to arrange the meeting (2 Tr. 13-15).

Kean met with Mucci on September 21, 1978.[2] Mucci offered Kean $2,000 immediately and an additional $2,000 upon the granting of a new trial for Bailey. Mucci also stated that $45,000 would be placed in escrow and transferred to Kean if Bailey was freed. Kean rejected Mucci's offer but indicated that he might be interested in $10,000 as front money (2 Tr. 139-140). The next day petitioner told Meadows "that Mucci didn't have the money that he promised Agent Kean and that everybody had to chip in a little bit to help Mucci out" (2 Tr. 19).[3]

On September 29, 1978, Meadows met with petitioner, Aufierio, and Gangemi at Aufierio's house. Petitioner, Aufierio, and Gangemi each placed money on the table, which petitioner and Gangemi counted to be $5,000. Meadows was asked whether Kean would accept the money, and Meadows said that they should give it to Kean directly (2 Tr. 19-22). As Meadows was leaving, Aufierio gave him a sweater and a hair dryer as a gift. The $5,000 to be given to Kean was later found in the sweater (2 Tr. 22-24).

ARGUMENT

1. Petitioner asserts (Pet. 19-22) that hearsay evidence was erroneously admitted at trial. The government introduced five tape-recorded conversations between Meadows and petitioner, and petitioner claims that

[2]Petitioner was originally supposed to attend the meeting, but in fact only Mucci met with Kean and Meadows (2 Tr. 16).

[3]During this conversation petitioner also told Meadows that they were "still having problems finding a location to set up the lab" (2 Tr. 19). Petitioner had repeatedly sought to have Meadows convince Kean to allow them to manufacture methamphetamine (2 Tr. 125).

Meadows' part of these conversations was hearsay. However, Meadows' statements were admitted not for the truth of the matter contained therein but only to give the context of petitioner's statements (1 Tr. 38). Meadows' portion of the conversation was thus admissible to make petitioner's statements intelligible to the jury. See *United States* v. *Rodriguez*, 509 F. 2d 1342, 1348 (5th Cir. 1975); *United States* v. *Lemonakis*, 485 F. 2d 941, 947-949 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974).[4]

2. Petitioner contends (Pet. 26-30) that the evidence at trial demonstrated the existence of multiple conspiracies. Petitioner does not claim that no agreement was reached to bribe Agent Kean, but he asserts that all of the conspirators did not enter into that agreement for the same reasons. In particular, petitioner argues that he was attempting to influence the DEA investigation into their illegal drug trafficking while Aufierio, Gangemi, and Mucci were seeking a new trial and subsequent acquittal for Bailey.

[4]Petitioner further asserts that two recorded conversations between Meadows and Aufierio should not have been admitted because Aufierio's statements concerning drug operations were not in furtherance of the conspiracy. As discussed below (pages 5-6, *infra*), petitioner's argument misconceives the nature of the conspiracy to bribe Agent Kean in order both to secure Bailey's release and to obtain a favorable outcome of a DEA investigation into the conspirators' alleged drug trafficking.

Petitioner also suggests (Pet. 22-23) that all the tape-recorded conversations were inadmissible because Meadows and Agent Kean purposely elicited incriminating statements from petitioner and Aufierio. The evidence shows no improper conduct by government agents, however, and there is no basis for a claim that statements made to a government agent are not in furtherance of a conspiracy simply because, unbeknownst to the declarant, the agent who elicited the statements had no intention to participate in the illegal activity.

Petitioner's argument is without merit. The subjective motivation of the co-conspirators is not an element of the crime of conspiracy to commit bribery. The fact that their motives may have diverged does not prevent the conspiracy from being formed, provided that, as here, each of the co-conspirators knowingly and intentionally entered into the unlawful agreement to commit the underlying offense together.

At all events, the record in this case adequately establishes that the co-conspirators shared the same designs for the conspiracy. As shown by the evidence at trial, the primary aim of the conspiracy was to secure the release of Bailey, and all of the conspirators, including petitioner, engaged in that aspect of the conspiracy (see, *e.g.*, 1 Tr. 26B, 31-33, 54-55; 2 Tr. 8, 10-12, 19, 123-124). By the same token, the evidence also showed that petitioner sought Kean's cooperation in order to protect the methamphetamine manufacturing operation run by the conspirators and that Aufierio and Gangemi discussed this drug laboratory with Kean (2 Tr. 125, 135-136). Accordingly, the evidence disclosed a single conspiracy to bribe a federal officer in order to achieve dual but common aims.

3. Petitioner claims (Pet. 31-34) that the evidence of his intent was insufficient because the agreement to bribe Agent Kean was conditional. The basis for this claim is petitioner's statement during his conversation with Meadows on September 13, 1978, that payment to Kean would not be made unless an appeal was "approved" (Pet. 32).[5]

[5]The meaning of petitioner's statement is unclear. Petitioner might have meant that Kean would be paid only if Bailey's appeal was successful.

Whatever the effect of this statement standing alone, the evidence showed that subsequent to this conversation petitioner and co-conspirators Aufierio and Gangemi engaged in a number of activities in furtherance of the conspiracy. In particular, they provided $5,000 to be given to Agent Kean (2 Tr. 21-24). This proof was sufficient to establish petitioner's criminal intent regardless of any condition that might previously have been discussed.

4. Petitioner asserts (Pet. 35-41) that evidence that he and his co-conspirators were involved in an illegal scheme to manufacture drugs should not have been admitted because it involved misconduct not charged in the indictment. As discussed above (pages 5-6, *supra*), however, one of the reasons for bribing Agent Kean was to protect this drug manufacturing operation. The evidence of drug-related conduct by the conspirators was thus properly admitted to show motive and intent. See Fed. R. Evid. 404(b).[6]

Petitioner acknowledges that the prosecution "was certainly entitled to have some evidence before the jury on motive * * *" (Pet. 40-41). His claim is simply that proof of motive could have been adduced in a manner less prejudicial to him, such as by stipulation. However, the district court's decision to admit the challenged evidence

[6]The district court instructed the jury that petitioner "is not charged with a violation of drug laws * * * [T]here has been some reference in this case to other matters. There is one offense [petitioner] is charged with, one, and one only, and it is that offense that you should make your determination and render your verdict on" (3 Tr. 13).

rather than to limit the prosecution to a "grossly bland" stipulation (1 Tr. 11) cannot fairly be deemed an abuse of its discretion.[7]

5. Finally, petitioner claims (Pet. 42-45) that the prosecutor improperly expressed an opinion concerning the evidence. After introducing into evidence a tape recording of an October 2, 1978, conversation between Meadows and co-conspirator Aufierio (2 Tr. 33-38), the prosecutor identified the next exhibit as a recorded conversation between Meadows and petitioner that also occurred on October 2, 1978 (2 Tr. 39-40). This statement was intended to distinguish between the two conversations that took place on the same date (2 Tr. 43) and was made in response to confusion that had arisen concerning the two recordings (2 Tr. 39-40). Petitioner objected to the prosecutor's statement, and the district court instructed the jury, as it had at the outset of the trial (1 Tr. 20-21), that the statements of counsel are not evidence and that the jury was to determine whether the conversation was in fact between Meadows and petitioner (2 Tr. 40-41). Moreover, after the initial portion of the tape was played for purposes of identification by the witness Meadows, the court again advised the jury that the prosecutor's statement was not evidence (2 Tr. 44). At that point, Meadows testified that he and petitioner had engaged in the conversation at issue (2 Tr. 44-45). Finally, in its closing charge, the court instructed the jury that it should decide the case only on the evidence, that it was the sole judge of the facts, and that the statements and opinions of

[7]The district court cautioned the government "to keep its evidence as to [this issue] as limited as possible to avoid unnecessary [harm to petitioner]" (1 Tr. 11).

counsel were not evidence (3 Tr. 10-12). In light of Meadows' testimony and the court's repeated instructions, the prosecutor's passing identification of the parties to the recorded conversation—made to distinguish that recording from Meadows' conversation with Aufierio on the same date—could not have prejudiced petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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